

Evidence Law Notes

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Burden and Standard of Proof

Burden of Proof		
Legal Burden	Obligation to persuade the court of a given proposition (i.e. the guilt of the accused).	
Evidentiary Burden	Obligation to produce sufficient evidence on a particular proposition to render that issue worthy of consideration by the court <ul style="list-style-type: none"> - Must be a sufficient foundation in every alleged issue → if judge determines that there is insufficient evidence the jury will not consider the issue - There must be a reasonable possibility that the issue exists 	
	Legal Burden	Evidentiary Burden
Prosecution	Always on prosecution in a criminal case to prove guilt and all elements of the crime (<i>Woolmington v DPP (1935)</i>).	With every legal burden - there is an accompanying evidentiary burden on the prosecution.
Defence	Legal burden on defendant when they raise the common law defence of insanity or as defined by a statutory offence.	Evidentiary burden shifts to the defendant when they raise a special defence, alibi etc. and then the burden of proof transfers to the accused. NOTE: the legal burden NEVER shifts.

Standard of Proof	
Criminal Proceedings	Civil Proceedings
Section 141	Section 140
(1) In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved BEYOND REASONABLE DOUBT . (2) In a criminal proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.	(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the BALANCE OF PROBABILITIES . <ul style="list-style-type: none"> - Strength of the evidence required to satisfy the BOP depends on the type of case (s140(2))

Judicial Notice

- Certain things that do NOT need to be proven → court will take “judicial notice” of the fact
 - ‘Court takes judicial notice of the fact that...’
- Applies to matters of common knowledge (s144)
- Two forms of judicial notice:
 1. Judicial notice without inquiry → something the court automatically takes notice of
 2. Judicial notice after inquiry → something that the court takes notice of after it is inquired into (e.g. fact proven by expert evidence)

Types of Evidence

Documentary Evidence

1. Definition of Document

Pursuant to s47(1) EA, < **INSERT EVIDENCE** > meets the definition of a document as it is < **SELECT FROM DEFINITION BELOW (EA Dictionary Part 1) / IT IS A REFERENCE TO A DOCUMENT (EA s47(2), Dictionary Part 2, Clause 8)** >. And thus, < **INSERT EVIDENCE** > can be considered documentary for the purposes of the EA.

Part 1 of Dictionary

- Non-exhaustive list

document means any record of information, and includes—

- (a) anything on which there is writing, or
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or
- (d) a map, plan, drawing or photograph.

Clause 8 Part 2 of Dictionary

- DO NOT need the original document (s51) → use this definition if you don't have the original doc
- Document includes a part of the doc (a), copy (b), part of a copy (c)

8 References to documents

A reference in this Act to a document includes a reference to—

- (a) any part of the document, or
- (b) any copy, reproduction or duplicate of the document or of any part of the document, or
- (c) any part of such a copy, reproduction or duplicate.

- **NOTE:** Part 2.2. rules for documents only apply when it is the CONTENTS of the document that are relevant → if the actual contents of the document are not being relied on → apply part 2.3
 - E.g. document found at the crime scene had the accuseds finger prints on it → this fact is being used to prove the accused was at the scene of the crime
 - What is on the document is irrelevant → it is real evidence

2. Prove the Contents of the Document

- Once you have document → need to prove its contents
- **NOTE:** no legislative requirement to adduce evidence of authenticity (BUT may be caused by tactical pressures → may produce evidence of authenticity if it is a live issue)

2a) Content Available

- Choose one of the methods below from s48(1)
- Pursuant to s 48(1) EA, **<INSERT PARTY>** has tendered the document themselves, and thus the contents of the document may be proved.
- Pursuant to s 48(1)(a) EA, **<INSERT PARTY>** has adduced evidence as to the contents of the documents through admissions about its contents. **<EXPLAIN>**. Thus the contents of the document may be proved.
- **NOTE:** s 48(3)

(3) If the party adduces evidence of the contents of a document under subsection (1) (a), the evidence may only be used—

- (a) in respect of the party's case against the other party who made the admission concerned, or
- (b) in respect of the other party's case against the party who adduced the evidence in that way.

- Pursuant to s48(1)(b) EA, **<INSERT PARTY>** has tendered a copy of the document and the copy is identical in all relevant respects. The copy has been produced by a device that reproduces the contents of documents (s48(1)(b)(ii)). **<EXPLAIN>**. Consequently, the contents of the document may be proved.
- Pursuant to s 48(1)(c) EA, **<INSERT PARTY>** has tendered a transcript of the document and the transcript is identical in all relevant respects. **<EXPLAIN>**. Thus the contents of the document may be proved.
- Pursuant to s 50(1) EA, as the document is voluminous and/or complex, **<INSERT PARTY>** has **sought leave** and tendered a summary of the document and the copy is identical in all relevant respects. **<EXPLAIN>**. Consequently, the contents of the document may be proved.
 - **MUST** seek leave before using s50

50 Proof of voluminous or complex documents

- (1) The court may, on the application of a party, direct that the party may adduce evidence of the contents of 2 or more documents in question in the form of a summary if the court is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question.
- (2) The court may only make such a direction if the party seeking to adduce the evidence in the form of a summary has—
 - (a) served on each other party a copy of the summary that discloses the name and address of the person who prepared the summary, and
 - (b) given each other party a reasonable opportunity to examine or copy the documents in question.

- Business records (s48(1)(e)).
- Public documents (s48(1)(f))

2b) Content Unavailable

On the facts, the content of the document is unavailable as, pursuant to the EA, the document <INSERT EXPLANATION FROM BELOW> (Pt 2 Clause 5 Dictionary).

- Cannot be found after reasonable inquiry and search
- Was destroyed in good faith
- Would be impractical to produce the document
- Production of the document may render a person liable to conviction for an offence
- It is not in the possession or control of the party and cannot be obtained

5 Unavailability of documents and things

For the purposes of this Act, a document or thing is taken not to be available to a party if and only if—

- (a) it cannot be found after reasonable inquiry and search by the party, or
- (b) it was destroyed by the party, or by a person on behalf of the party, otherwise than in bad faith, or was destroyed by another person, or
- (c) it would be impractical to produce the document or thing during the course of the proceeding, or
- (d) production of the document or thing during the course of the proceeding could render a person liable to conviction for an offence, or
- (e) it is not in the possession or under the control of the party and—
 - (i) it cannot be obtained by any judicial procedure of the court, or
 - (ii) it is in the possession or under the control of another party to the proceeding concerned who knows or might reasonably be expected to know that evidence of the contents of the document, or evidence of the thing, is likely to be relevant in the proceeding, or
 - (iii) it was in the possession or under the control of such a party at a time when that party knew or might reasonably be expected to have known that such evidence was likely to be relevant in the proceeding.

Pursuant to s 48(2) EA, <INSTERT PARTY> may adduce evidence of the contents / existence of the unavailable document in question by;

- (a) tendering a copy / extract / summary of the document (s48(4)(a); *Sleiman* [1999]) OR
- (b) adducing from a witness evidence of the contents of the document (s48(4)(a); *Sleiman* [1999])
 - **NOTE:** can only use this if the existence and contents of the document are NOT an issue
 - Document not available → instead you can call a witness to give evidence as to what the document actually contained

(4) A party may adduce evidence of the contents of a document in question that is not available to the party, or the existence and contents of which are not in issue in the proceeding, by—

- (a) tendering a document that is a copy of, or an extract from or summary of, the document in question, or
- (b) adducing from a witness evidence of the contents of the document in question.

R v Cassar & Sleiman [1999]

- **FACTS** → only evidence that a car had been at a motel on the night of the incident was a motel registration form which was unavailable as it could not be found
 - Contents of the form had been recorded by police on a piece of paper and faxed to another police officer who recorded its contents on a running sheet
 - The piece of paper and fax were both missing → only the running sheet was available
- **HELD** → running sheet was admissible as tendering evidence of a summary of the contents of the document (the registration form) which was not available pursuant to s48(4)(a)
- Police was able to give oral evidence of what he saw in the registration form pursuant to s48(4)(b) after using the running sheet to refresh his memory per s32

Evidence Law | Notes

- Audio and visual recordings
 - Audio and visual recordings are documents under EA (*Butera v DPP* [1987])
 - Transcripts = permissible forms of secondary evidence of a recording's content (s48(1)(c))
 - For unavailable recordings (if unavailable document definition satisfied) → can have a witness give evidence of the content of the recording (s48(4)(b))
- Photographs
 - Photographs are explicitly included in definition of documents under EA
 - NOTE: gruesome photos may be excluded on the grounds that they are more prejudicial than probative (s137)
- Maps, models, charts and diagrams
 - May create a chart / diagram which acts as a visual aid to explain a complex piece of evidence (e.g. a company structure)
 - No value independent of the evidence it is summarising but if it is defined as an exhibit it can be taken into the jury room for examination
 - Visual aid or summary is only admissible if the court is satisfied that the admission is likely to assist the tribunal of fact to decide the issues before it (*Smith v Queen* [1970] → HCA allowed a chart prepared by an expert witness)
 - s29(4) → allows for summaries, charts and explanatory material

(4) Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

Real Evidence

- Real evidence:
 - Exhibits (physical objects)
 - Views (experiments, demonstrations and / or inspections)

Exhibits

- S52 permits physical objects to be tendered as evidence

Pursuant to s52 EA, <INSTERT PARTY> is able to adduce evidence other than through witness testimony or documents. For the purposes of the EA, this includes physical, tangible objects such as <EXPLANATION OF THE EXHIBIT>.

- Before admitting non-testimonial evidence:
 1. The evidence must be relevant
 2. Must be a basis for finding that the evidence is what it purports or is alleged to be

Views

- **S53** allows for the conduct of demonstrations, experiments or inspections
 - Judge or jury is NOT allowed to conduct a view in deliberations (**s53(4)**) or outside of the scope of **s53** (*R v Bilal Skaf* (2004))
 - Departure from **s53** may constitute a miscarriage of justice
- **NOTE:** **s53** does not apply to in-court demonstrations
 - Only applies to things that happen outside the court (*Evans v R* [2007])
 - Common law applies to views that take place IN the courtroom (**s52**)

53 Views

- (1) A judge may, on application, order that a demonstration, experiment or inspection be held.
- (2) A judge is not to make an order unless he or she is satisfied that—
 - (a) the parties will be given a reasonable opportunity to be present, and
 - (b) the judge and, if there is a jury, the jury will be present.
- (3) Without limiting the matters that the judge may take into account in deciding whether to make an order, the judge is to take into account the following—
 - (a) whether the parties will be present,
 - (b) whether the demonstration, experiment or inspection will, in the court's opinion, assist the court in resolving issues of fact or understanding the evidence,
 - (c) the danger that the demonstration, experiment or inspection might be unfairly prejudicial, might be misleading or confusing or might cause or result in undue waste of time,
 - (d) in the case of a demonstration—the extent to which the demonstration will properly reproduce the conduct or event to be demonstrated,
 - (e) in the case of an inspection—the extent to which the place or thing to be inspected has materially altered.
- (4) The court (including, if there is a jury, the jury) is not to conduct an experiment in the course of its deliberations.
- (5) This section does not apply in relation to the inspection of an exhibit by the court or, if there is a jury, by the jury.

54 Views to be evidence

The court (including, if there is a jury, the jury) may draw any reasonable inference from what it sees, hears or otherwise notices during a demonstration, experiment or inspection.

Pursuant to **s53 EA**, **<INSTERT PARTY>** may make an application to the court for a demonstration / experiment / inspection. The judge is likely to make (not make) the order as the parties will (will not) be given reasonable opportunity to be present (**s53(2)(a)**) and the judge / jury will be present (**s53(2)(b)**). Additionally, the judge is likely to grant (not grant) the view because **<CONSIDERATION OF S53(3)>**.

- a) the parties will / will not be present
- b) the view will / will not assist the court in resolving issues of fact or understanding evidence
- c) the view may be unfairly prejudicial, misleading or confusing
 - If the view may be prejudicial / misleading → directions can be given to the jury to address this (*R v Milat* (1996))
- c) the view may cause an undue waste of time
- d) the demonstration will / will not properly reproduce the conduct / event
- e) the thing which is to be inspected has been materially altered

Witnesses

- Witnesses are available for examination if they are:
 - 1. Competent
 - 2. Compellable

Competence

1A. Competent Witness

Prima facie, **<WITNESS>** is presumed to be competent and compellable unless the court finds otherwise (s12).

As no exception as stipulated by Part 2.1, Division 1 EA arises on the facts, without further information, this presumption is not rebutted and **<WITNESS>** can give evidence regarding **<FACTS>**.

As **<WITNESS>** is seemingly competent and has a capacity to understand that there is an obligation on them to give truthful evidence, they are required to provide sworn evidence after taking an oath or affirmation (s21(1)).

1B. Incompetent Witness

Defendant

As **<PARTY>** is the defendant in the proceedings, in accordance with the burden of proof and presumption of innocence, **<PARTY>** is automatically deemed to be incompetent to give evidence for the prosecution (s17(2)).

Non-Defendant Witness

Prima facie, **<WITNESS>** is presumed to be competent and compellable unless the court finds otherwise (s12). However, pursuant to (s13(1)), it is likely that **<WITNESS>** will be deemed incompetent to give evidence because:

- They do not have capacity to understand a question about the fact (s13(1)(a))
- They do not have capacity to give an answer that can be understood (s13(1)(b))

And this incapacity cannot be overcome.

13 Competence: lack of capacity

- (1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):
 - (a) the person does not have the capacity to understand a question about the fact; or
 - (b) the person does not have the capacity to give an answer that can be understood to a question about the fact;and that incapacity cannot be overcome.

Note: See sections 30 and 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.

Therefore, **<WITNESS>** cannot understand their obligation under s21(1) to give truthful evidence and cannot provide sworn evidence as they are not competent (s13(3)). Nonetheless, **<WITNESS>** may still

be required to give unsworn evidence (s13(5)). Procedurally, unsworn evidence will be treated in the same way as sworn evidence.

Before allowing <WITNESS> to give unsworn evidence, the court must satisfy the requirements of s13(5).

- (5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person:
 - (a) that it is important to tell the truth; and
 - (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs; and
 - (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

NOTE → MAY STILL BE COMPETENT TO GIVE OTHER EVIDENCE

Whilst <WITNESS> lacks capacity regarding <CERTAIN FACT>, they may still be competent to give evidence about <OTHER FACT> (s13(2)).

Witness Becomes Incompetent

Pursuant to s13(7), although <WITNESS> died / became incompetent before completing their evidence, this does not automatically deem the evidence already adduced inadmissible.

Compellability

2A. Compellable Witness

As **<WITNESS>** is competent to give evidence about **<FACT>**, they are compellable to give said evidence as no exceptions to this presumption arise on the facts (s12).

2B. Exception to Compellability of Witness

Although **<WITNESS>** is competent, they are not compellable to give said evidence because **<APPLY EXCEPTION>**.

- Head of state / parliament (s15)
- Reduced capacity (s14)

Defendant

- Pursuant to s 17(2) EA, as **<PARTY>** is the accused, **<PARTY>** is not compellable to give evidence as a witness for the prosecution.

Co-Accused

- Pursuant to s 17(3) EA, as **<PARTY>** is the co-accused and has not been given a separate trial, **<PARTY>** is not compellable to give evidence as a witness for the prosecution.

Defendant's Relative

- As **<WITNESS>** is the accused's **<DE FACTO PARTNER, PARENT, CHILD, SPOUSE>**, they may object to being required to give evidence as a witness for the prosecution (s18(2)).
 - Apply s18(6) and s18(7)
 - **NOTE** → s18 NA to certain offences involving children (apply s19)
- If there is an objection, the witness must not give evidence if the Court finds that:
 - There is a likelihood of harm to either the witness or the relationship s18(6)(a); and
 - The nature / extent of the harm outweighs the desirability of having the evidence s18(6)(b)
- In reaching a decision under s18(6) the court may take into account the following (s18(7))
 - (a) the **nature and gravity of the offence** for which the defendant is being prosecuted,
 - Less likely to force witness to give evidence for a low level offence
 - (b) the **substance and importance of any evidence** that the person might give and the weight that is likely to be attached to it,
 - Will the evidence be given due weight? E.g. evidence of mother of defendant unlikely to be given due weight so redundant to force her to give evidence
 - (c) whether **any other evidence** concerning the matters to which the evidence of the person would relate is **reasonably available** to the prosecutor,
 - Will not compel witness if the evidence can be given another way
 - (d) the nature of the **relationship between the defendant** and the person,
 - Consider domestic violence, character of accused and nature of relationship
 - Court will consider preserving a relationship with children involved in a relationship by not forcing a spouse to give evidence (*R v Khan (1996)*)
 - (e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in **confidence** from the defendant.
 - Court will not require a witness to commit the tort of breach of confidence
- s18(7) is a non-exhaustive list